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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN K. YEE AND IRENE S. YEE, H.N.
and FRANCIS C. BERGER FOUNDATION,
MOUNTAIN SHADOWS MOBILE HOME ESTATES,
RICHARD C. KUEBLER, dba MOONGLOW
MOBILE HOME ESTATE, VISTA VERDE, LTD.,
IMPERIAL ESCONDIDO MOBILE ESTATES and
MILDRED D. TACEY,

Petitioners,

VS.

THE CITY OF ESCONDIDO,
Respondent.

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA

AMICUS CURIAE BRIEF OF THE CALIFORNIA ASSOCIATION OF REALTORS® AND NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the California Association of REALTORS® and the National Association of REALTORS® respectfully submit this amicus curiae brief in support of Petitioners.

Amicus curiae California Association of REALTORS® ("C.A.R.") is a voluntary trade association whose members consist of local Boards of REALTORS® in California and those persons licensed by the state of California as real estate brokers and salespersons who are members of local boards. C.A.R. is the largest state trade association in the United States and has 180 affiliated Boards of REALTORS® and over 135,000 members.

The mission of C.A.R. is to serve in developing and promoting programs and services that will enhance the members' freedom and ability to conduct their individual businesses successfully with integrity and competency. Moreover, C.A.R. serves to promote, through collective action, the preservation of private property rights.

Amicus curiae National Association of REALTORS® ("N.A.R.") is also a voluntary, non-profit association, comprised of over 750,000 persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraisal, management, and counseling. N.A.R. also includes among its members approximately 1,900 State and local Boards and Associations of REALTORS®, including C.A.R.

N.A.R. was created in 1908 to promote and encourage the highest and best use of the land, to protect and promote

private ownership of real property, and to advance professional competence in the rendition of real estate services.

The members of C.A.R. and N.A.R. (hereinafter collectively referred to as "REALTOR® Amici") further believe that every person should have the right to acquire real property with confidence and certainty that the value of such property will not be unduly diminished or jeopardized by governmental action at any level unless just compensation is paid.

REALTOR® Amici believe the continuing demand for rental housing can best be met by private investors willing to take long-term capital risks, and support a mutually beneficial owner-rental occupant relationship which will encourage a continuing supply of adequate and affordable housing. With the extensive proliferation of land use regulations that greatly restrict the uses of private property, REALTOR® Amici, their members and all the property owners they represent have a significant interest in the outcome of this case and the law it establishes.

Not only is there a need to resolve the conflict between the decision of the California Court of Appeal and those of the United States Courts of Appeals for the Third and Ninth Circuits, there is a need for further guidance from this Court as to when a governmental regulation so undermines private

property rights that compensation under the United States Constitution is required.

Counsel for REALTOR® Amici are familiar with the questions involved and the scope of their presentation and believe that further argument on the issues discussed by this amicus curiae brief will be helpful to this Court.

SUMMARY OF ARGUMENT

The decision of the California Court of Appeal is incorrect as the combined effect of the California Mobile Home Residency Law and the Escondido mobile home rent control ordinance is to deprive petitioners of their property without just compensation. REALTOR® Amici agree with the United States Courts of Appeals for the Third and Ninth Circuits that such mobile home rent control laws effect a physical occupation of property constituting a per se taking requiring compensation for the value of the real property interests taken from mobile home park owners and transferred to mobile home tenants.

REALTOR® Amici submit that the rent control law also constitutes a regulatory taking entitling petitioners to just compensation. Whether governmental action amounts to a regulatory taking requires evaluation of the character of the governmental action, its economic impact and its interference with reasonable investment-backed expectations. Even though

this case comes to this Court upon a demurrer, there is no real dispute that the challenged law effects a transfer of fundamental real property rights and corresponding wealth from the landowner to the tenant, a drastic governmental action which has a severe economic impact completely at odds with a landowner's investment expectations.

While this Court has identified the above general criteria to be applied in the takings clause analysis, it has also expressly recognized that such evaluation is difficult because of the lack of precise rules and detailed guidelines. This case presents an opportunity for this Court to provide desperately needed guidance to lower courts as well as to lawmakers with respect to jurisprudence concerning regulatory takings.

Finally, the rent control law is invalid because it does not substantially advance a legitimate governmental interest. It does not further the goal of providing more affordable housing. Indeed, its likely ultimate result is less available housing and more expensive mobile homes.

ARGUMENT

A. The Mobile Home Rent Control Law Constitutes A Per Se Taking Requiring Just Compensation.

1. The Mobile Home Rent Control Law Extinguishes Valuable Real Property Possessory Interests Of The Landlord.

Petitioners' complaint alleges that the mobile home rent control law has effected a transfer of valuable possessory interests in their real property to their tenants. Even though this case is at the pleading stage, there is no question that this is the result of the law. Indeed, the California Court of Appeal in this case states, "No one can dispute that Escondido's rent control ordinance, like the ordinance in *Oceanside*, effects a transfer of value from landlords to tenants." *Yee v. City of Escondido,* 224 Cal.App.3d 1349, 1354, 274 Cal.Rptr. 551 (1990), *review denied,* Cal. LEXIS 353 (Cal. Jan 24, 1991).

In a challenge to a similar mobile home rent control scheme, the Third Circuit Court of Appeals noted that it was alleged that the tenants "are given valuable and alienable

possessory interests to occupy park pads with a controlled rent -- a possessory interest which belongs to the appellants." *Pinewood Estates of Michigan v. Barnegat Township Leveling Board,* 898 F.2d 347, 352 (3rd Cir. 1990). In fact, the tenant who receives the transferred property interests, for nothing, realizes monetary compensation when that tenant sells the mobile home to an incoming tenant. The Court of Appeals found that the premium paid by the new tenant is a payment "to the departing tenant of what amounts to rent for the use of the pad. This 'rent' is for the possessory interest of the landlord. Thus, this is a case where other persons, tenants, have been granted interests in property which properly belongs [sic] to the appellants, the landlords." *Id.* at 353; *see also* Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol,* 35 UCLA L.REV. 399, 420-423 (1988) (hereinafter cited as Hirsch & Hirsch).

Similar allegations were made in *Hall v. City of Santa Barbara,* 833 F.2d 1270, 1276 (9th Cir. 1986), *cert. denied sub nom. Santa Barbara v. Hall,* 485 U.S. 940 (1988) about another comparable California mobile home rent control law. In *Hall* the Court concluded that mobile home park owners would have a constitutional right to compensation for the taking of their property if they could prove,

> that the . . . [challenged ordinance] has transferred a possessory interest in their land to each of their . . . tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferrable, has an established market and a market value.

Hall v. City of Santa Barbara, 833 F.2d at 1276. Applying *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), the Courts in *Pinewood Estates* and *Hall* opined that valid causes of action had been pleaded and that if these elements were satisfied, the rent control ordinances would effect a physical occupation of the landowner's property constituting a per se taking under the Fifth Amendment.

The Ninth Circuit Court of Appeals subsequently held that with respect to a mobile home rent control scheme virtually identical to that imposed in Escondido, there was a "physical occupation" of the real property constituting a per se taking requiring just compensation. *Azul Pacifico Incorporated v. City of Los Angeles,* 1991 U.S. App. LEXIS 26335 (9th Cir. Nov. 1, 1991). It affirmed the District Court's finding, after trial on the

merits, that each of the elements identified in *Hall* and *Pinewood Estates* had been satisfied in that case. *Id.* at 1-2. While REALTOR® Amici agree that the California Mobile Home Residency Law (CAL. CIV. Code §§ 798 - 799.6 (Deering's 1990), hereinafter cited as "MHRL") and the Escondido mobile home rent control ordinance necessarily effect a physical occupation of a landlord's property, they submit that this constitutes a regulatory taking as well.

B. Imposition Of The Escondido Mobile Home Rent Control Law Results In A Regulatory Taking.

1. The Regulatory Taking Analysis Requires A Factual Ad Hoc Evaluation.

Decisions of this Court establish that governmental regulation short of physical invasion may constitute a taking because such action may result in "as complete [a loss] as if the [government] had entered upon the surface of the land and taken exclusive possession of it." *United States v. Causby,* 328 U.S. 256, 261 (1946).) While this Court has recognized that there is no "set formula" to determine a regulatory taking and indeed, that the "question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," (*Penn Central Transportation Co. v.*

City of New York, 438 U.S. 104, 123 (1978)) it has identified the following factors which must be considered in such an evaluation: "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action." *Id.* at 124 (citation omitted); *see also, Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1986).

As Justice Holmes advised, "[I]f regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In addition, the "Fifth Amendment's guarantee . . . [is] designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be born by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Since there is no set formula for determining when a taking has occurred, the question of "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Penn Central Transportation v. City of New York*, 438 U.S. at 124 (citation omitted).

This case presents the Court with an opportunity to apply and further define the above multifactor test. Although many commentators have written about "investment-backed expectations" and the other factors mentioned in the leading regulatory cases, none have been able to discern a consistent definitional framework sufficient to place owners and regulators on notice of the consequences of their actions.[1] REALTOR® Amici specifically urge this Court to clarify that regulations such as this mobile home rent control law improperly interfere with property owners' rights and investment-backed expectations so as to constitute a compensable taking.

2. The Economic Impact Of The Mobile Home Rent Control Law Is Severe.

As noted above, the economic impact of the law is an immediate, irrevocable transfer of wealth from landlord to tenant. The economic impact is massive. For example, in *Azul*

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[1]See, e.g., Rose-Ackerman, *Against Ad Hocery: A Commentary on Michelman*, 88 COLUM. L. REV. 1697 (1988) (arguing that the uncertainty created by ad hoc inquiry is detrimental to the real estate community and the economy as a whole); Epstein, *An Outline of Takings*, 41 U. MIAMI L. REV. 3 (1986); Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630 (1988); Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 J. OF URB. AND CONTEMP. L. 3 (1987) (concluding that the test may as well be ignored); Michelman, *Takings*, 88 COLUM. L. REV. 1600 (1988).

Pacifico the district court calculated damages, based on "the average premium charged on" sale, at $20,880 per mobile home sold. *Azul Pacifico v. City of Los Angeles*, 1991 U.S. App. LEXIS at 14. "Diminution in property value, standing alone" may not establish a taking. *Penn Central Transportation v. City of New York*, 438 U.S. at 131. Yet, the challenged rent control law so dramatically impacts the financial aspects of mobile home park ownership and so radically changes the economic and legal relationship between landlord and tenant that it constitutes a regulatory taking.

3. The "Character Of The Governmental Action" Is That It Substantially Interferes With The Landowners' Real Property Rights.

"In deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with the rights. . . " *Penn Central Transportation v. City of New York*, 438 U.S. at 130.

The necessary magnitude of interference with property rights has not been precisely set forth or addressed by this Court under the factual and legal circumstances presented by

this case. However, the Court "must consider whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" *Penn Central Transportation v. City of New York*, 438 U.S. at 136 (quoting *Pennsylvania Coal v. Mahon*, 260 U.S. at 413).

The critical property rights have been described "as the rights to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945). In addition, "one of the essential sticks in the bundle of property rights is the right to exclude others." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979). Any interference with such right must be evaluated to determine whether there has been a taking.

The state and local mobile home laws substantially interfere with landlords' property rights by transferring them in perpetuity to the tenant. The impact is severe. The tenant is given a lifetime possessory interest in the property owner's land (mobile home pad) which the tenant can sell, use or dispose of as the tenant desires. "This perpetual estate in essence transmutes an at-will tenancy into a relatively permanent estate in land. The result of these changes in the law is that a tenancy . . . [has] become tantamount to a fee ownership, . . ." Hirsch & Hirsch, *supra* p. 7, at 421.

Even if all aspects of property ownership were not extinguished by the rent control law, that will not preclude a finding that there has been a regulatory taking.

> [W]e have recognized that regulations -- unlike physical invasions -- do not typically extinguish the 'full bundle' of rights in a particular piece of property. . . . This characteristic of regulations frequently makes unclear the breadth of their impact on identifiable segments of property, and has required that we evaluate the effects in light of the 'several factors' enumerated in *Penn Central Transportation*.

Keystone Bituminous Coal Ass'n v. De Benedictis, 480 U.S. 470, 516 (1987) (Rehnquist, C.J., dissenting).

Here the dramatic redistribution of property rights by the Escondido rent control law operating in combination with the MHRL demonstrates that there has been a taking.

In ruling that a New York law restricting development of the air space above Grand Central Station did not violate the takings clause, this Court cautioned that "the question of the severity of the impact of the law on appellants' parcel, and its resolution in turn requires a careful assessment of the impact of

the regulation on the . . . site." *Penn Central Transportation v. City of New York*, 438 U.S. at 136. The impact on a mobile home park owner's site is not only dramatic but no alternatives are available to the landlord to make up his loss.

Thus, this case is distinguishable from *Penn Central Transportation*, in which the New York law did not transfer any of Penn Central's real property possessory interests to anyone else. Penn Central was not even prohibited from all construction above the Grand Central terminal site. In fact it was allowed to recoup any loss it might sustain at that site by transferring development rights it held with regard to the terminal to other land parcels nearby. *Penn Central Transportation v. City of New York*, 438 U.S. at 137.

More is involved here than a "mere loss of money" or "profit" as respondent asserts. This is not like *United States v. Sperry Corp.*, 493 U.S. 52 (1989), in which no interests in real or personal property were involved. While monetary values, of course, are being transferred, so too are fundamental possessory interests in real property.

4. The Mobile Home Rent Control Law Frustrates Landowners' Reasonable Investment-Backed Expectations.

As this Court recognized in *Penn Central Transportation*, "[A] state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Penn Central Transportation v. City of New York*, 438 U.S. at 127. Thus, in *Kaiser Aetna v. United States*, 444 U.S. at 178, this Court found that the "Government's attempt to create a public right of access to the improved pond" interfered with Kaiser Aetna's "'reasonable investment backed expectations.'" *PruneYard Shopping Center v. Robins*, 447 U.S. at 84.

The challenged mobile home rent control law contravenes the reasonable investment-backed expectations of the owner of the property. Because the rent control ordinance depresses rents below market, the value of the mobile home upon sale by the existing tenant is increased by a premium in a comparable amount; this premium, a windfall to the tenant and loss to the landowner, clearly was not anticipated by the landowner when making the investment in the mobile home park. It is not a reasonable expectation of landowners that

valuable, marketable and alienable possessory interests in their land will be transferred to their tenants in perpetuity without any compensation to them.[2]

5. This Regulation Goes "Too Far."

While the determination of what constitutes a regulatory taking admittedly may be ad hoc, the challenged rent control law, in the words of Justice Holmes, "has gone too far," because it immediately and irrevocably causes a massive transfer of wealth and real property possessory rights from one private party to another. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), although unable to decide on the merits of the case because of procedural deficiencies, this Court made a statement that could be construed to clarify the concept of when a regulation goes "too far" as "the point at which the regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Id.* at 199 (footnote omitted); *see also, Pennsylvania Coal v. Mahon*, 260 U.S. at 413. The challenged rent control law is obviously onerous. It also "has the same

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[2]As this Court held in *First English Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), even a temporary unexpected restriction of use of property can constitute a regulatory taking.

effect as an appropriation of property"; it is tantamount to a physical occupation depriving landowners of their basic property rights.

6. The Policy Consideration Of Avoiding Unfair Burdens On Private Individuals Supports The Conclusion That The Challenged Law Constitutes A Regulatory Taking.

The policy underlying the takings clause, that the public should not force upon one individual more than his just share of the burdens of government, applies in this case. *See, Nollan v. California Coastal Commission,* 483 U.S. 825, 841 (1987); *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 325 (1893). Assuming arguendo that any legitimate governmental purpose is served by the mobile home rent control law, the monetary burden is more properly imposed on society as a whole rather than upon individual mobile home park owners. As the Ninth Circuit Court of Appeals correctly acknowledged: "The city may choose to create such a windfall for current coach owners. If it does so, however, it must spread the burden on all its citizens, not target one small class of individuals to foot the bill." *Azul Pacifico v. City of Los Angeles,* 1991 U.S. App. LEXIS at 36. It may be that governments faced today with

diminishing tax revenues may find it more economically "acceptable" to utilize land use regulations rather than eminent domain in an attempt to satisfy a community's needs. It is certainly more politically expedient and less expensive to pass an onerous regulation than to condemn property or fund social programs. However, if governments choose to attempt to accomplish such goals by destroying fundamental property rights and concurrently transferring wealth from one private party to another, particularly under the circumstances of this case, then there must be just compensation for such a taking.

C. The Mobile Home Rent Control Ordinance Does Not Further A Legitimate Public Interest.

To be valid at all, a regulation must pass very close scrutiny demonstrating that it substantially advances a legitimate state interest. *Nollan v. California Coastal Commission,* 483 U.S. at 841. Yet, the Escondido mobile home rent control law does not substantially accomplish the goal of providing more affordable housing for tenants. By restricting an owner's ability to adjust rents when mobile homes are sold in place, the ordinace obliges incoming tenants to pay large premiums, nominally for the used mobile home, but in actuality for the use of the owner's property. The increase in sales price in actuality represents additional rent for the use of the space which rightfully belongs to the landlord.

> [T]he purchaser of a mobile home who pays a premium for the right to keep the home in a mobile home park pays for the cost of the tenancy rather than for the mobile home. Thus, the premium is nothing more than rent for the pad which, depending upon whether the purchase is financed or paid for in cash, the new tenant pays during his tenancy or in advance.

Pinewood Estates v. Barnegat Township, 898 F.2d at 353 (footnote omitted). Similarly, in *Hall v. City of Santa Barbara,* the Court stated that, assuming appellants' allegations therein were true,

> the Santa Barbara ordinance will do little more than give a windfall to current mobile park tenants at the expense of current mobile park owners. If, as appellants allege, the ordinance has resulted in a substantial increase in the market price of mobile homes subject to the ordinance, this may well hinder rather than assist lower-income families seeking access to rental units in mobile park homes.

Hall v. City of Santa Barbara, 833 F.2d at 1281.

Indeed, by increasing the sales price rather than amortizing the value as rent over the period of the lease, the rent control law makes it more difficult for new tenants who must marshal greater assets for a down payment for purchase of the coach. In an empirical study it was found that, "rent control tends to raise the housing cost of all mobile home owners, other than those who were renting at the time the rent control ordinance was enacted." *Hirsch & Hirsch, supra* p. 7, at 432; *Hall v. City of Santa Barbara,* 833 F.2d at 1281. In *Azul Pacifico* the Court found: "[V]acancy control does not help incoming tenants in the case of mobile homes. The coach buyer will have to pay the same effective rent for the pad whether or not the landlord is permitted to raise the rent at vacancy." *Azul Pacifico v. City of Los Angeles,* 1991 U.S. App. LEXIS at 18.

Thus, the departing tenant will receive monetary consideration that the landlord would otherwise get. The Court of Appeal in *Azul Pacifico* declared that it was "unable to see how this transfer of wealth from one group of citizens to another can serve any rational governmental purpose." *Id.* at 19.

The Court in *Azul Pacifico* did conclude that the ordinance therein served a "governmental purpose" of protecting existing tenants "from being forced to sell their coaches at distress-sale prices in the event the landlords were to set rents for new tenants so high that no one would want to buy the coach." *Id.* at 20. However, this is pure speculation. Apparently this was based on some testimony in *Azul Pacifico* "from mobile home tenants" that they *believed* they would have difficulty selling their mobile homes because landlords would raise the rents too high. *Id.* This testimony was obviously conjecture since the rent control law was in effect. Such unproven theory does not satisfy the rigorous "nexus" test recently enunciated by this Court in *Nollan v. California Coastal Commission*, 483 U.S. at 837. Indeed, since the trial court in *Azul Pacifico* enjoined enforcement of the rent control ordinance in that case, presumably because it was invalid, it necessarily concluded there was no substantial public benefit furthered by it.

There is no evidence in the record in this case that in mobile home parks not subject to rent control, tenants are unable to sell their mobile homes because the rents are raised too high. Rather, there is a market for used mobile homes whose value is computed by traditional "blue book" methods for personal property. Hirsch & Hirsch, *supra* p. 7, at 401 n.5.

Rather than rely on unproved speculation, REALTOR® Amici respectfully direct this Court to the following conclusion of the aforementioned empirical study:

"In conclusion, if the purpose of rent control is to assure deserving tenants housing at a reasonable rent, the extent to which mobile home tenants are able to appropriate these benefits makes rent controls in a mobile home context unfair and perhaps even counterproductive in the long run." Hirsch & Hirsch, *supra* p. 7, at 448.

CONCLUSION

The decision of the California Court of Appeal should be reversed.

Respectfully submitted,

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